In the United States Court of Federal Claims

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BRIAN LEWIS, *

Plaintiff, * No. 07-591C
Filed: August 7, 2009

v. *

UNITED STATES OF AMERICA, *

Defendant. *

* * * * * * *

ORDER AND OPINION

Plaintiff appeals a ruling of the Board for Correction of Naval Records. In this court, he alleges wrongful discharge, denial of disability retirement benefits, and various constitutional and civil rights violations. Defendant filed motions to dismiss wrongful discharge claims not heard by the Corrections Board and for judgment on the administrative record. We grant the Government's motions for the reasons explained below.

BACKGROUND

Mr. Lewis served in the United States Navy from June 1997 until August 2001, when he received a General Discharge. Administrative Record 6 (AR 6). His experience in the Navy was marked by problems with alcohol dependency, depression, occasional suicidal tendencies, and disrespect for senior officers. Navy medical personnel evidently found it difficult to diagnose plaintiff's problems, which likely were exacerbated by a sexual assault while serving on the USS FRANK CABLE.

Case law binding on this court limits our review of plaintiff's claims to those brought before the Board for Correction of Naval Records. For that reason,

and because of the standards of review applicable to such a review, we must deny plaintiff the relief he seeks.

FACTS

Submarine Service

Plaintiff was serving aboard the submarine USS COLUMBIA in December 1998, when he developed a depressive disorder and became delinquent in his job qualifications. A medical officer found Mr. Lewis fit for full duty, but recommended counseling for his occupational problems.

The Navy Medical Clinic in Pearl Harbor, Hawaii, evaluated plaintiff on March 1, 1999, and diagnosed him with adjustment disorders and occupational problems. The doctor found Mr. Lewis fit for full duty in a surface squadron. Later that month, another doctor found plaintiff "unsuitable for further military service," and reported that he posed a continuing danger to himself and others in the Navy. AR 276. She recommended that Mr. Lewis be separated from the Navy for "longstanding disorder of character and behavior." AR 276. The same Navy doctor performed a follow-up evaluation in April 1999 and noted that Mr. Lewis was coping better with stress and depression. She found him motivated to remain in the Navy. Plaintiff had stopped drinking alcohol, the doctor observed, and she concluded that Mr. Lewis was "suitable for military service." AR 278.

Plaintiff was disqualified from further submarine duty after a review of his medical records in April 1999 by the Undersea Medical Officer. The Navy transferred Mr. Lewis to the USS FRANK CABLE in May 1999.

Aboard the USS FRANK CABLE

Mr. Lewis was placed in a four-week treatment program for alcohol dependency in November 1999, then reevaluated in January 2000. The doctor noted that plaintiff was motivated to continue working on his personality disorders and that alcohol had been a major factor in his problems. In her opinion, Mr. Lewis could "resolve his personality disorder characteristics over time" through Alcoholics Anonymous. AR 246. Later that year, however, plaintiff was sexually assaulted aboard ship.

A psychiatrist who examined Mr. Lewis after the August 2000 attack found "mild to moderate [post traumatic stress disorder]." AR 205. When later he threatened violence against his commanding officer, plaintiff was evacuated to the Naval hospital in Yokosuka, Japan. AR 215. There, he was diagnosed with adjustment disorders and "a personality disorder, not otherwise specified." AR 215. The record from that hospital visit noted plaintiff's alcohol dependence and depression, and plaintiff was advised to refrain from alcohol consumption. AR 215-19. Mr. Lewis was returned to his ship's home port in Guam for further treatment.

Counseling and Treatment

A clinical social worker examined Mr. Lewis in October 2000 at the hospital in Guam and concluded that plaintiff suffered from alcohol dependence and a personality disorder, not otherwise specified. A staff psychiatrist confirmed that Mr. Lewis was alcohol-dependent and had dysthymia with post-traumatic stress disorder, but did not believe that he had a personality disorder. AR 192. Plaintiff entered the hospital for three days of psychiatric observation during November 2000, and later was assigned to a security detail at the San Diego Naval Station.

Mr. Lewis' misconduct continued in 2001. Plaintiff attributed his behavior to feelings of anxiety and depression related to the assault that he suffered aboard ship the previous August. His condition worsened until February 19, 2001, when he was hospitalized for suicidal ideation. Three days later, plaintiff was discharged from the hospital for limited duty. He received outpatient counseling and medication for major depressive disorder, post traumatic stress disorder, and histrionic personality traits.

Plaintiff continued outpatient counseling with mixed results into August 2001. Mr. Lewis complained of unethical treatment by his treating psychiatrist during counseling in May 2001. AR 170. He continued to have "small levels of trouble" with superior officers, AR 168, and was moved to a private living space, AR 166. Some reports noted improvements, but a psychological evaluation in July 2001 resulted in a diagnoses of continued alcohol abuse and personality disorders not otherwise specified, "with[] schizoid, avoidant, narcissistic and antisocial traits." AR 134. The treating psychologist concluded that Mr. Lewis'

personality disorders made him unsuitable for continued military service because he posed a danger to himself and others if retained on active service. The psychologist recommended that plaintiff be separated from the Navy.

Mr. Lewis left the Navy on August 15, 2001, with a General Discharge (Under Honorable Conditions) for convenience of the Government.

PROCEEDINGS

Plaintiff sought relief from the Board for Correction of Naval Records (BCNR) in September 2002, asking that his records show that he retired on disability. The BCNR denied his request in August 2004 because it found that plaintiff was not "unfit for service by reason of physical disability at the time of [his] discharge." AR 1. The Board concluded that evidence of record was not sufficient to show probable material error or injustice. AR 1.

Mr. Lewis petitioned the Naval Discharge Review Board in December 2002, while his appeal to the Corrections Board was pending, to change his discharge from General to Honorable. He filed another petition over two years later, in May 2005, asking that his discharge be characterized as honorable and his "Narrative Reason for Separation be changed to 'Retired - [Transferred] to Fleet Reserve.'" AR 60. The Review Board denied both requests, finding that plaintiff's discharge was proper in the circumstances.

Mr. Lewis appealed to this court, alleging wrongful discharge and various torts and constitutional violations. He contends that the Navy's decision to deny him retirement for disability was unlawful, and asks for correction of his Naval records to remove negative performance evaluations. The Government moved to dismiss the wrongful discharge count of plaintiff's complaint for waiver, because he did not argue that issue before the Corrections Board. Defendant also moves for judgment on the administrative record.

DISCUSSION

Plaintiff asked the Corrections Board to change his discharge to Medical Honorable Discharge for post-traumatic stress disorder. He did not raise the wrongful discharge argument before that Board. Defendant contends that Mr.

Lewis' wrongful discharge claim must be dismissed because any claim not presented to the Corrections Board is considered waived on appeal to this court.

Defendant points out that this court lacks jurisdiction to hear plaintiff's civil and constitutional rights claims, and those sounding in tort. Moreover, Mr. Lewis' claims do not meet the standards for overturning rulings of the Corrections Board.

Plaintiff admits that he did not raise the wrongful discharge claim before the BCNR. Compl. ¶ 14. He argues, however, that he was not required to bring any particular claim before the BCNR before filing suit in this court because appeal to the Corrections Board is not a prerequisite to filing in this court. *See Martinez v. United States*, 333 F.3d 1295 (Fed. Cir. 2003) (reaffirming the rule that the corrections boards are a permissive administrative remedy and not a prerequisite to filing suit under the Tucker Act). Mr. Lewis also relies on a disability rating and a retirement stipend granted by the Department of Veterans Affairs[1] to support his claim of wrongful discharge. AR 4. Plaintiff believes that this court should consider his allegations of ethical breaches by Navy doctors and failure of Naval personnel to follow applicable regulations.

Wrongful Discharge Claim

Pro se litigants are entitled to procedural latitude in drafting pleadings. *See, e.g.*, *Haines v. Kerner*, 404 U.S. 519, 520 (1972). *Pro se* plaintiffs must comply with this court's jurisdictional requirements, however. *Kelley v. Sec'y Dept. Of Labor*, 812 F.2d 1378, 1380 (Fed. Cir. 1987). A plaintiff's *pro se* status may explain factual ambiguities in his filings, but it cannot excuse failings. *Henke v. United States*, 60 F.3d 795, 799 (Fed. Cir. 1995).

Plaintiff is correct that resort to a corrections board is permissive. *See Martinez,* 333 F.3d at 1304-05. It was not necessary for Mr. Lewis to argue wrongful discharge or any other claim to the BCNR before gaining access to this court. Having chosen to take his case first to the BCNR, however, Mr. Lewis was

[1] Plaintiff was awarded a combined disability rating of 100 percent for major depression and post-traumatic stress disorder by the Department of Veterans Affairs in July 2002. This award included a retroactive benefit payment and a monthly stipend.

bound to raise all issues that he would appeal here. He cannot raise a new claim here after taking his case to the Board. *See, e.g.*, *Metz v. United States*, 466 F.3d 991 (Fed. Cir. 2006); *Gallucci v. United States*, 41 Fed. Cl. 631, 644 (1998) (observing, "[i]t is inappropriate for this court to review on appeal, new issues which should have been brought to the attention of the administrative agency competent to hear it, in this case, the BCNR.") (citing *Doyle v. United States*, 599 F.2d 984, 1000 (Ct. Cl. 1979)).

Record of BCNR Decision

Mr. Lewis challenges the BCNR's denial of his request to "correct [his] records to indicate that he received a Medical Honorable Retirement for service connected disability." Compl. ¶ 39. His post-traumatic stress disorder was incurred in the line of duty, according to plaintiff, and that entitles him to a disability retirement.

Plaintiff must show that the Board's decision was "arbitrary, capricious, unsupported by the evidence, or contrary to law." *Barnes v. United States*, 473 F.3d 1356, 1361 (Fed. Cir. 2007). He must present "cogent and clearly convincing evidence" from the administrative record to make such a showing. *Arrens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992).

Mr. Lewis was separated from service based on well-documented diagnoses of personality disorder, not otherwise specified. The Corrections Board sought and relied upon an advisory opinion from the Naval Medical Center. AR 45-49. The forensic psychiatrist at the Naval Medical Center examined plaintiff's BNCR file, Service Record, and Medical Record. AR 45. The advisory opinion found that plaintiff met the criteria for the personality disorder prior to his sexual assault and the post traumatic stress disorder and major depressive disorder after the assault. AR 48. The recommendation was that plaintiff's General Discharge remain unchanged because plaintiff "met diagnostic criteria for a Personality Disorder Not Otherwise Specified and was appropriately recommended for separation based on his diagnosis twice prior to his sexual assault." AR 48. The opinion noted that the stress and depressive disorders were "medically boardable conditions, but that they do not "preclude a service member from administrative separation for a Personality Disorder." AR 48. The BCNR agreed and adopted the opinion. The Record

supports the Board's findings concerning Mr. Lewis' diagnoses of personality disorder prior to his assault.

Plaintiff argues, however, that his diagnoses of depressive disorder and post-traumatic stress disorder entitle him to retirement for disability. Naval regulations provide that certain conditions may to entitle a service member for disability retirement, but "a service member who has one or more listed conditions or physical defects is not automatically unfit and therefore may not qualify for separation or retirement disability." Secretary of the Navy Instruction 1850.4D § 8001(a). Depression and post-traumatic stress disorder are two such "defects." The Navy did not find him unfit for service for either problem. The Navy did, however, discharge Mr. Lewis based on a personality disorder that rendered him incompatible with naval service. The BCNR found both actions proper under the circumstances. We find that decision supported in the record.

Plaintiff further contends that an award he received from the Department of Veterans Affairs for disability pay and other assistance is evidence that the Board's decision was arbitrary and capricious. The Department of Veterans Affairs (VA) has duties to service members that are separate and distinct from those of the military services. The VA "determines to what extent a veteran's earning capacity has been reduced as a result of specific injuries . . . ." *Lord v. United States*, 2 Cl. Ct. 749, 754 (1983). The military determines a service member's "fitness for performing the duties of office, grade, and rank . . . ." *Haskins v. United States*, 51 Fed. Cl. 818, 826 (2002); *see also Champagne v. United States*, 35 Fed. Cl. 198, 212 (1996) (holding that a VA rating decision is not binding on the Navy).

The Corrections Board took note of plaintiff's argument that his symptoms of post-traumatic stress disorder had become worse after discharge. However, it emphasized that his symptoms having become "more severe following [his] discharge does not demonstrate that [his] discharge was erroneous . . . fitness and disability determinations made by the Armed Forces are fixed as of the date of the member's separation." AR 1. We cannot say that the Board's findings in this regard are arbitrary or capricious.

Other Claims

Plaintiff alleges violations of his constitutional and civil rights and other claims sounding in tort. The Tucker Act grants this court jurisdiction over claims "against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or . . . for liquidated or unliquidated damages in cases not sounding in tort . . . ." 28 U.S.C. § 1491(a)(1) (2006).

Claims must be based upon a provision that can be read to mandate the payment of money for its violation, separate from the Tucker Act itself. *See, e.g.*, *United States v. Mitchell*, 463 U.S. 204, 217 (1983); *Todd v. United States*, 386 F.3d 1091, 1094 (Fed. Cir. 2004). Claims brought under the due process and equal protection clauses of the Fifth and Fourteenth Amendments to the Constitution do not mandate the payment of money for their violation. *See Mullenberg v. United States*, 857 F.2d 770, 773 (Fed. Cir. 1988). The same is true, in these circumstances, of allegations of ineffective assistance of counsel. Such claims not based on money-mandating provisions must be dismissed for lack of jurisdiction.

Mr. Lewis' Complaint includes allegations of torts committed against him by agents of the United States. The Tucker Act prohibits such claims. *See* 28 U.S.C. § 1491(a)(1). His Civil Rights Act claims must be dismissed for lack of jurisdiction. Federal district courts have exclusive jurisdiction of civil rights claims. 28 U.S.C. § 1343(a) (2006); *Lowe v. United States*, 76 Fed. Cl. 262, 266 (2007).

Plaintiff alleges a violation of the Military Whistleblower Protection Act. *See* 10 U.S.C. § 1034 (2006). This court does not have jurisdiction to hear Whistleblower cases. *Hernandez v. United States*, 38 Fed. Cl. 532, 536-37 (1997).

CONCLUSION

Review of decisions of the military corrections boards is limited in this court to claims presented to those boards. *See Gallucci*, 41 Fed. Cl. At 644 ("it is inappropriate for this court to review on appeal, new issues which should have been brought to the attention of the administrative agency competent to hear it") The record of plaintiff's arguments before the BCNR do not include claims for wrongful discharge.

Military personnel are not required to petition correction boards before coming to this court, but if they do, they must present their entire cases or risk the likelihood of waiver. This may be a trap for the unwary *pro se* plaintiff, a jurisdictional one. Neither the Government nor the court may waive a jurisdictional defect for a *pro se* plaintiff.

The Record of this case does not show that the Navy handled Mr. Lewis' case in an exemplary manner. The test courts use in reviewing board rulings such as this one is whether the Administrative Record establishes that the Board's actions were arbitrary or capricious or contrary to law. *Barnes*, 473 F.3d at 1361. We cannot determine from the Administrative Record that the Board acted improperly according to that standard.[2]

Mr. Lewis chose to file his claims first at the Board for Correction of Naval Records. Having done so, his arguments here must be those brought before the Board. Claims not raised at the Board level are waived in federal court. *Metz*, 466 F.3d at 999-1000.

Defendant's motions to dismiss and for judgment on the Administrative Record are GRANTED. The Clerk of Court will dismiss plaintiff's Complaint. No costs.

s/Robert H. Hodges, Jr.
Robert H. Hodges, Jr.
Judge

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[2] Plaintiff presented allegations regarding breaches of Naval regulations to the Naval Discharge Review Board. Plaintiff opposed inclusion of the record before the Discharge Board in the Administrative Record. Mr. Lewis confirmed that his case was based on proceedings before the BCNR only. We denied plaintiff's motion and allowed that information to be part of the record, provided that it was relevant only to proceedings before the BCNR. *Lewis v. United States*, No. 07-591C (Fed. Cl. Feb. 11, 2008) (order denying plaintiff's motion to strike portions of the administrative record). This case is limited to review of the BCNR decision.